Date: March 8, 1999

Case No.: 1996-DBA-18

In the Matter of:

Disputes concerning the payment of prevailing wage rates and overtime,and proper classification by:

BILL J. COPELAND
Prime Contractor,

With respect to laborers and mechanics employed by the prime contractor under contracts with the National Forest Service, United States Department of Agriculture (U.S.D.A.), San Bernardino National Forest,San Bernardino County, California; Contract No. 50-9JA9-1-1L039(SantaAnaRiverTrail,Construction/Reconstruction)and Contract No. 50-9JA9-1-1L026(SerranoComfortStation, Construction/Reconstruction).

APPEARANCES:

On behalf of the Secretary:

Barbara A. Matthews, Esquire
U.S. Department of Labor
Office of the Solicitor
71 Stevenson Street, Suite 1110
San Francisco, California 94105

On behalf of the Respondent:

Bill J. Copeland, Pro Se
P.O. Box 306
Beaumont, California 92223

BEFORE: **Samuel J. Smith**
Administrative Law Judge

DECISION AND ORDER ON REMAND

This matter arises under pertinent provisions of the Davis-Bacon Act ("DBA"), as amended, 40 U.S.C. §§ 276a-276a-7, 276c, the Contract Work Hours and Safety Standards Act ("CWHSSA"), as amended, 40 U.S.C. §§ 327-332, and the regulations promulgated thereunder and contained at 29 C.F.R. Parts 5 and 6. Pursuant to 29 C.F.R. §§ 5.11(b)(2), 5.12(b)(1) (1994), Bill J. Copeland (the "Prime Contractor" or "Respondent"), has timely requested an administrative hearing to review the findings of the Regional Administrator, United States Department of Labor, Employment Standards Administration, Wage and Hour Division (the "Administrator"), as contained in a letter dated March 28, 1995. This matter was assigned to the undersigned Administrative Law Judge on September 17, 1996, for the purpose of conducting a formal hearing.

PROCEDURAL HISTORY

The following procedural history of this matter can be derived from the record as currently constituted. Where possible, citations to the record have been included.[1]

In September of 1991, the Prime Contractor was awarded two construction contracts by the United States Department of Agriculture, National Forest Service. (GX-A; GX-B). Both contracts were for construction/reconstruction projects to be performed in the San Bernardino National Forest. (GX-A; GX-B). These contracts, which incorporated provisions of the DBA and CWHSSA, required that work commence on October 22, 1991, and October 23, 1991. (GX-A; GX-B). Work on one contract was to be completed within 213 days, while work on the other was to be completed within 120 days. (GX-A at 2; GX-B at 2).

As early as March of 1992, the Wage and Hour Division ("WHD") received several complaints from persons alleging that they were employees of Prime Contractor, working on the aforementioned projects. (GX-T through GX-Z; GX-1) Therein, said individuals alleged that they were not being paid the prevailing wage rate as required by the DBA. (GX-T through GX-Z; GX-1) Based upon these

[1]The following abbreviations will be utilized herein: TR1 for the transcript of the pre-hearing conference, TR2 for the transcript of the formal hearing, RX for Respondents Exhibits, PX for Complainant's Exhibits, GX for Govenment's Exhibit, GR for Government's Response to Show Cause Order, MSD for Contractors Motion for Summary Decision, MD for Contractors Motion to Dismiss and AMSD for Contractors Amended Motion for Summary Decision.

allegations, WHD undertook an investigation of Prime Contractor and the contracts in question.

In a letter dated July 10, 1992, and addressed to the USDA, WHD indicated that they had conducted their investigation and determined that DBA violations had occurred. (GX-M) As such, WHD requested that $37,635.00 in funds otherwise due to Prime Contractor under the contract be withheld pursuant to 29 C.F.R. § 5.9. (GX-M; **see also** 29 C.F.R. § 5.9 (1994)) It was also suggested that an additional $270.00 be withheld as liquidated damages resulting from alleged CWHSSA overtime violations. (GX-M) In a meeting conducted on July 13, 1992, Prime contractor was informed that the sum of $37,905.00 would be withheld based upon WHD's request and suggestion. (GX-N at 1)[2]

Despite WHD's conclusion in July of 1992, that violations of DBA and CWHSSA had occurred, Prime Contractor was not formally charged with any such violations for over two years. The charges which were made are contained in a letter addressed to Prime Contractor, dated July 27, 1994. (GX-R)

Under the applicable regulations, Prime Contractor had thirty (30) days within which to object to the charges and request an evidentiary hearing before the Office of Administrative Law Judges. 29 C.F.R. § 5.11(b)(2) (1994) Prime Contractor responded to this charging letter by filing a timely objection and request for hearing on August 9, 1994. (GR at 5)

It is apparent that no action was taken on Prime Contractor's request for hearing for over three months. As a result, on November 27, 1994, Prime Contractor filed a petition with the Wage Appeals Board seeking, **inter alia**, an order directing the Administrator to issue an "Order of Reference." (GR at 5)[3] An "Order of Reference" is the formal mechanism through which the administrator refers DBA matters to the Office of Administrative Law Judges for formal hearing. 29 C.F.R. § 5.11(b)(3) (1994).

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[2]In a letter dated June 7, 1993, WHD requested additional withholding of payments under the contracts, bringing the total amount withheld to $71,025.06. (GX-Q) Apparently, this additional amount was never withheld. During the pre-hearing conference, counsel for the government stated that the total amount withheld by USDA was $37,905.00. (TR1 at 8)

[3]At the time, the Wage Appeals Board was the tribunal with authority to issue final agency decisions under the DBA and the CWHSSA. See 29 C.F.R. §§ 6.8, 6.34 (1994). As of April 17, 1996, this authority has since been delegated to the Administrative Review Board ("ARB"). **See** Secretary's Order 2-96 (APR. 17, 1996), 61 Fed. Reg. 1978 (May 3, 1996).

In an Order dated January 31, 1995, the Wage Appeals Board granted the Administrator's motion to dismiss the Prime Contractor's petition. **In re Copeland Construction Co.**, WAB Case No. 94-20 (Jan. 31, 1995). Therein, the Board found that the matter was not yet "properly before this administrative appellate body." **Id.**, slip op. at 4. Nonetheless, the Board noted the Administrator's delay in issuing both the charging letter and the "Order of Reference," and expressed its concern about "...the deleterious effects of delay in investigating and adjudicating wage and hour cases...." **Id.** at 3. Therefore, in addition to dismissing the petition, the Board urged the Administrator "to expeditiously issue an Order of Reference in this matter." **Id**. at 4.

Another two months expired without the issuance of an Order of Reference. Rather, on March 28, 1995, WHD sent another charging letter to Prime Contractor. (GX-S) WHD informed Prime Contractor that this letter superseded the prior charging letter of July 27, 1994 (GX-S at 1). It also informed Prime Contractor as to WHD's finding that there was "reasonable cause to believe that the violations of the [DBA]...constitute a disregard of obligations to employees within the meaning of section 3(a) of the [DBA]." (GX-S at 2) As a result, WHD indicated that it would seek debarment of Prime Contractor, as provided in Section 3(a) of the DBA and the applicable regulations. See 29 C.F.R. § 5.12 (1994). Again, Prime Contractor filed a written request for hearing within the prescribed thirty (30) day period. (GR at 6)

Despite this second request for a hearing, no action was taken by WHD for almost one year. By way of an Order of Reference dated February 5, 1996, counsel for the Administrator referred this matter to the Chief Administrative Law Judge, Office of Administrative Law Judges, in Washington, D.C. On March 12, 1996, then-Acting Chief John M. Vittone issued a "Prehearing Order" requiring the submission of a pre-hearing statement from counsel for the Department of Labor within thirty (30) days, and a response thereto from the Prime Contractor within an additional twenty (20) days.

On April 11, 1996, counsel for the Administrator filed a request for a sixty (60) day extension of the pre-hearing submission deadline. Therein, it was stated that "the attorney in this office to which this litigation is assigned is in the western Pacific, to try a series of OSHA matters; he is not expected back until late May." Also on April 11, 1996, Prime Contractor objected to this request for an extension. By way of an order dated April 10, 1996, Judge Vittone granted the Administrator's request for a sixty (60) day extension of the filing deadline. The Department's

response to the pre-hearing order was received on July 17, 1996, and the Prime Contractor's response was received on July 11, 1996.

On July 5, 1996, the Prime Contractor filed a "Request to Expedite Hearing" with the Office of Administrative Law Judges. In an order dated July 23, 1996, Judge Vittone granted the Prime Contractor's request and referred this matter to the Office of Administrative Law Judge's regional office in San Francisco for assignment. The case was subsequently assigned to the undersigned Administrative Law Judge on September 17, 1996.

As received in this office the file contained Prime Contractor's "Request for Motion to Dismiss" and a "Request for Motion for Summary Decision," both of which were filed on August 26, 1996. Upon reviewing these motions, the undersigned found that neither was served upon counsel for the Department. As such, the undersigned issued an Order to Show Cause on September 19, 1996, ordering counsel to show cause as to why the motions should not be granted. The government's response was timely filed via facsimile on October 11, 1996. Prime Contractor's reply to the government's response was received on October 23, 1996.

In a Notice dated November 5, 1996, the undersigned informed the parties that a live pre-hearing conference would be convened on December 9, 1996. At that time, the undersigned would address several discovery disputes raised by the parties, as well as rule upon Prime Contractor's motions. In order to facilitate the pre-hearing conference, the parties were ordered to submit pre-hearing statements, including among other things, the names and addresses of all witnesses and an exhibit list.

A pre-hearing conference was in fact held on December 9, 1996, at Long Beach, California. Prime Contractor appeared **Pro Se**, and submitted his "Response to A.L.J.'s Notice of Prehearing Conference." (TR1 5,6) Although this response complied with the undersigned's order in most parts, it did not give the last known address for each intended witness. Mark Ogden, Esquire, appeared on behalf of the Administrator. (TR1 at 4) Despite the undersigned's order, counsel indicated during the conference that he had no pre-hearing statement to file at that time. (TR1 6-7) Counsel stated that he would rely upon the pre-hearing statement submitted on June 17, 1996, although said statement did not contain an exhibit list or addresses of witnesses, as required by the undersigned's Notice of November 5, 1996. (TR1 at 6)

During the course of this conference, it became apparent that there was a possibility of settlement. As such, the undersigned gave the parties the option of going off the record and conducting

a settlement conference. (TR1 at 8-9) The undersigned did in fact convene a settlement conference, which after lengthy discussion, was unsuccessful. Therefore, the undersigned went back on the record in the prehearing conference. (TR1 at 11)[4]

During the remainder of this conference, a schedule for discovery was set between the parties. (**See generally** TR1 at 13-53) Both parties were given a period of ten (10) days to submit prehearing statements conforming with the undersigned's November 5, 1996, order. (TR1 at 12-13) Within the same ten (10) day period, counsel for the Administrator was to notify the undersigned whether he intended to file a motion for summary decision, and Prime Contractor was to file any amendments to his earlier motions for summary decision and/or dismissal. (TR1 at 66, 68)

Adding the prescribed time for filing by mail, these documents were due in this office on December 24, 1996. **See** 29 C.F.R. § 18.4(c) (1994) On December 16, 1996, Prime Contractor timely filed an "Amended List of Witnesses, Showing Last Known Address," as well as an "Amended Motion for Summary Judgment."

The "Government's Response to Prehearing Conference Order" was filed in this office on January 10, 1997. No explanation was given as to why the document was filed more than two weeks late, and no request for an extension of the deadline was ever received or granted.[5] Furthermore, although the filing did list the last known addresses of witnesses to be called, there was no discussion as to whether the Administrator intended to file a motion for summary decision. Therefore, it was assumed that the Administrator did not intend to file such a motion.

On January 28, 1997, the undersigned issued a Decision and Order Granting Motion to Dismiss. It was noted that Prime Contractor's motions raised the issues of laches and due process, both based upon the alleged administrative delay in processing this matter. The undersigned utilized the four factor framework set forth in **In re Public Developers Corp**., WAB Case No. 94-02, at 8

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[4]Insofar as the undersigned had conducted settlement discussions with both parties, the parties were given the opportunity to raise any objections they had to the undersigned continuing as the trier-of-fact in this matter. (TR1 at 11-12) Both parties stated that they had no such objection. (TR1 at 12)

[5]Prime Contractor's objection to the untimeliness of this filing was received in this office on January 15, 1997. The Administrator's request for an indefinite continuance of the deadline for any response to Prime Contractor's objection was filed via facsimile on January 22, 1997.

(July 29, 1994),[6] and found that Prime Contractor carried his burden of showing that he had been prejudiced by the extreme and inexcusable administrative delay in bringing this matter to hearing. Therefore, it was ordered that the matter should be dismissed with prejudice and that all monies withheld from prime Contractor be returned to him.

Specifically, the undersigned found that, as a result of the administrative delay, Prime Contractor would not be afforded an administrative hearing until June of 1997. This would be more than five years after the initial investigation, almost five years from the date funds were first withheld, and almost three years since the Order of Reference should have been issued. The undersigned found that this constituted excessive administrative delay. It was also found that most of the reasons for the five year delay in bringing this matter to a hearing were attributable to WHD, the Administrator, or counsel for the Administrator, not Prime Contractor. The undersigned found that the "reasons" did not excuse the extensive administrative delay in bringing the matter to hearing. I further found that Prime Contractor had repeatedly asserted his rights under the law, as he filed two timely requests for a hearing and he alleged that he had been prejudiced by the well-documented administrative delay. Finally, the undersigned found that it should be presumed that the extensive delays in this matter resulted in prejudice to Prime Contractor and his ability to defend against the charges.

The Administrator requested review of the January 28, 1997 decision, and such request was granted by the Board on March 10, 1997. The Board's review of the case record indicated unwarranted delay on the part of the Administrator in bringing this matter to resolution. On September 25, 1997, an order was issued requiring the Administrator to provide to the Board and the parties a list of witnesses certified to be available and willing to testify at a hearing on the merits of this case. The Administrator responded on October 14, 1997, and indicated three available witnesses for a hearing: the WHD investigator and two complaining former employees, Mayberry and Patterson.

By Decision and Order of Remand dated October 31, 1997, the Board affirmed in part, reversed in part, and remanded this matter for proceedings consistent with their decision. The Board found that the Administrator's unwarranted delay, combined with

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[6]The four factors to be considered are: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of his/her rights; and 4) prejudice to the defendant. **Public Developers**, at 8.

Copeland's inability to conduct prehearing discovery with former complaining employees who were not certified to be witnesses at the hearing, was prejudicial to Copeland with regard to their claims in this case. Therefore, the Board barred recovery of their potential claims against Copeland, and the Order of Reference with regard to the claims of those claimants were dismissed. Furthermore, the Board adopted the administrative guidance set out in **Public Developers**, and remanded the case to this Administrative Law Judge to first determine after a fact finding hearing if a case against Copeland can be made. The Board instructed that this Administrative Law Judge can determine after a hearing if Copeland has been actually prejudiced in his defense on the merits with regard to the claims of employees Patterson and Mayberry, and whether such prejudice is directly attributable to the procedural delay.

For the reasons stated above, the Board affirmed in part, reversed in part, and remanded the case for hearing consistent with the Decision and Order of Remand. The Board directed that the administrative proceedings below should be completed as soon as practicable giving full consideration to the interests of the Complainant and consonant with the work load of the presiding ALJ. The Administrator was restricted to calling only the certified witnesses at the hearing on the merits. Finally, the administrator was ordered, to the extent possible, to determine the probable amounts of back pay that might be owing to Patterson and Mayberry, and lift the hold, save for such amount, on those funds presently held by the U.S. Department of Agriculture (Forest Service), pursuant to letters sent by Regional WHD Office on July 10, 1992 and June 7, 1993, and request that such funds be remitted to Copeland forthwith.

The case file was sent to the Office of the Solicitor in San Francisco, California. In a letter to San Francisco District Chief Judge Edward C. Burch, dated February 13, 1998, the Regional Solicitor forwarded the case file, noting that it was seemingly missent to that office. A Notice of Hearing and Pre-Hearing Order was issued, scheduling this matter for a formal hearing on June 9, 1998. The formal hearing had to be postponed due to the undersigned's medical status.[7] Pursuant to a duly issued Notice of Continued Hearing and Notice of Conference Call, the above-captioned matter was called for hearing on July 28, 1998 in the Glen Anderson Federal Building, 501 West Ocean Boulevard, Suite 5150, Long Beach, California. All parties were given full

[7]The decision in this matter has been delayed due to the illness of the undersigned's wife, who was diagnosed with breast cancer in early January of 1998; as well as recurring medical problems sustained by the undersigned, requiring life saving surgery on January 22, 1999.

opportunity to present evidence and argument. The hearing continued through July 30, 1998, when it was recessed. The Hearing reconvened on September 9, 1998, and continued until September 11, 1998, when it was completed.

The following exhibits were identified and entered into the record:

Plaintiff's exhibits PX 1 through PX 30. Contractor's exhibits CX 19, CX 93, CX 93A, CX 98 through CX 100, CX 112, and CX 16.

The Contractor's post hearing brief was timely filed on November 10, 1998. Plaintiff's Proposed Findings of Fact and Conclusions of Law was filed November 24, 1998, and Plaintiff's post hearing brief was filed on November 24, 1998, after having been granted two extensions.

Investigation-Conclusions

Following investigation by the Wage and Hour Division, the Department of Labor found the following violations which were noted in the Summary of Investigative Findings based on the record as constituted at the time (PX 29):

Nature of Violations

Davis Bacon and related Acts (DBRA)
- Failure to pay prevailing wage rates
- Failure to pay for all hours worked

Contract Work Hours and Safety Standards Act (CWHSSA)
- Overtime

Recordkeeping (Section 5.5(a)(3) of Regulations, 29 CFR Part 5)
- Incomplete records
- Failure to maintain basic payroll records
- Failure to submit certified payroll records
- Submission of falsified payroll records

Investigation Findings

Applicable Wage Decision:	CA91-2
Wage Rates Required:	$25.15 (Trail Contract) $25.15 (Serrano Comfort Station)
Wage Rates Allegedly Paid:	Various piece rate per foot
Total Back Wages Computed:	$71,025.06
DBRA:	$69,022.36

CWHSSA: $ 2,002.70
Total Number of Employees Underpaid: 7
Back Wages Paid: 0

Concerning the proposed debarment, the Regional Administrator of the Wage and Hour Division had found reasonable cause to believe that the violations of the Davis-Bacon Act by Bill J. Copeland, Prime Contractor, constitute a disregard of obligations to employees within the meaning of Section 3(a) of the Act.

ISSUES

The issues presented for resolution by this Court are the following:

1. Whether or not Respondent failed to comply with the applicable prevailing wage rates and failed to pay for all hours worked in violation of the Davis-Bacon Act an its implementing regulations, with respect to Mr. Mayberry and Mr. Patterson; and if not, the extent of the underpayments.

2. Whether Respondent failed to pay overtime compensation at a rate of not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours per week, in violation of the CWHSSA implementing regulations, with respect to Mr. Mayberry and Mr. Patterson.

3. Whether Respondent failed to maintain accurate and complete payroll and hours records in violation of 29 C.F.R. § 5.5, with respect to Mr. Mayberry and Mr. Patterson, including, but not limited to, the alleged submissions of falsified certified payrolls.

4. Whether or not Respondent, and any firm in which he is known to have a substantial interest, should be debarred, based upon his disregard of his obligations to his employees, pursuant to the provisions of the Davis-Bacon Act and 29 C.F.R. § 5.12.

5. Pursuant to the Administrative Review Board Decision and Order of October 31, 1997, has Respondent actually been prejudiced in his defense of these matters on account of any procedural delays caused by the Plaintiff Administrator.

STIPULATIONS

1. Respondent stipulated that he was required to comply with the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act.

On March 9, 1998, Respondent made several claims against the U.S. Department of Labor, which the I determined that I did not have jurisdiction to hear. To preserve these issues by way of appeal, they were recited into the record. (TR2 20)

1. Whether or not Respondent's Constitutional right to due process of law was violated when the United States Forest Service withheld payments for work performed on two federal contracts.

2. If Respondent prevails in the present matter, whether he is entitled to attorney fees and costs under the Equal Access to Justice Act.

3. If Respondent prevails in the present matter, whether he is entitled to interest on the amounts withheld under the two federal contracts he had with the United States Forest Service.

Trial Testimony

At the hearing, the Department of Labor presented testimony of David Mayberry, John Patterson, David Relph, Douglas A. Hyde-Sato, Sandra Goodman and Brian Taverner.[8]

Respondent testified on his own behalf, as well as presenting testimony of Jonathan David Copeland, Candace Humphries and Richard Aspril.

Testimony of Bill J. Copeland

Respondent stated that he was awarded a contract from the United States Forest Service for the construction/reconstruction of the Santa Ana River Trail on about September 21, 1991, and that Ms. Peggy Silberberger was the contracting officer. Work began on the Santa Ana River Trail contract on October 28, 1991. To work on the contract, Respondent hired Cheryl Mallie as the superintendent and John Patterson and David Mayberry as laborers. Ms. Mallie's duties were to keep records of the hours worked and to pick up and deliver money to the laborers. For this work, Ms. Mallie was paid $800.00 per week.(TR2 125-127) Respondent explained that he had an arrangement with Ms. Mallie whereby he gave her a truck and she was supposed pay him $200.00 for a set period as repayment. This

[8]By Decision and Order of Remand dated October 31, 1997, the Administrative Review Board (the "Board") restricted the Administrator to calling only the certified witnesses at the hearing on the merits. The Board identified the certified witnesses as the WHD investigator, Mr. Mayberry and Mr. Patterson. Given the Board's order, the testimony of David Relph, Douglas A. Hyde-Sato and Brian Taverner will not be considered by this Administrative Law Judge.

agreement was not in writing. Respondent also explained that Ms. Mallie was given the privilege of "going in and buying anything she wanted," and that money counted towards her salary. (TR2 136-140) Respondent stated that most of the checks written to Cheryl Mallie were to be divided amongst the men. (TR2 148) Various checks were brought to Respondent's attention for the purpose of identifying who they were to and what they were for. (TR2 130-173)

Respondent explained that he is an ordained Baptist minister, and that the projects were to try to get homeless and unemployed people back on their feet. He further explained that Mr. Mayberry and Mr. Patterson were homeless.(TR2 175-176) Respondent's attention was directed to a document referred to as a tool memo addendum, and he explained that it was an agreement he made with the men at the beginning of the work that they were not to work overtime. It was also agreed that the laborers were to obtain all hand tools, the ownership of which would remain with the contractor, and the tools would be the responsibility of each laborer and would be charged to their advanced wages accounts. When the tools were returned, the laborers would be given a full credit charged to their accounts, with no deductions for normal wear. Respondent prepared these documents on October 20, 1991 and October 30, 1991. He did not remember whether or not he showed these documents to the Forest Service. However, he did state that he showed them to Mr. Patterson. (TR2 185-188; PX 6)

Respondent stated that he paid Mr. Patterson the prevailing wage of $25.15 an hour[9], and that he never promised to pay him $11,000.00 plus a bonus. He also stated that it was not true that he paid Mr. Patterson only about $300.00 per week. Respondent paid Mr. Patterson in cash, except for a check in the amount of $500.00 "that he extorted from me." Respondent paid Mr. Patterson in cash because that is how Mr. Patterson asked to be paid. Respondent stated that Mr. Patterson was also compensated as he was allowed to charge items to Respondents account. Respondent fired Mr. Patterson on December 20, 1991 because "he was drunk and dirty and smelled like a pig and wasn't working on the job." He also stated that he told Mr. Patterson that he "wouldn't have anybody working for me that was going around behind my back and making threats to my integrity and threats to my good name and destroying my credit with the Forest Service." Respondent stated that he never threatened Mr. Patterson. (TR2 189-193)

[9]The certified payrolls establish that four the first four pay periods, Respondent utilized an hourly wage of $25.00. (PX 5)

With regards to Mr. Mayberry, Respondent stated that he was shown the tool memo addendum. He also stated that he agreed to pay Mr. Mayberry $25.15 per hour, and that he never promised to give Mr. Mayberry $11,000.00 plus a bonus. He further stated that it is not true that he only paid Mr. Mayberry $300.00 per week. Respondent always paid Mr. Mayberry in cash. Respondent withheld income tax, state disability and FICA taxes from both employees. Responded also deducted from Mr. Mayberry the pre-advanced wages, which were accumulated by charging things. Respondent fired Mr. Mayberry because he left an unattended fire along the forest trail. He stated that he informed the employees that they were not to build warming fires. (TR2 193-200; PX 6)

Respondent stated that, before he started the Santa Ana River Trail project, Forest Service employees explained that the contract was covered under the Davis-Bacon Act, and that he was required to pay workers the applicable prevailing wage. He was told that he was required to pay workers $16.19 per hour, but he stated that this was over his objection, and $8.96 per hour for fringe benefits. Respondent's attention was directed to PX 3, which listed wages of $16.19 per hour and $8.96. Respondent stated that such amounts were left blank on the statement given to him at the end of the pre-work conference. Respondent's attention was directed to PX 3, which purported to list wage rates of $16.19 and $8.96. (TR2 208-216; PX 3, PX 2) Respondent stated that before he started the Santa Ana River Trail contract, the Forest Service explained the CWHSSA to him and informed him that he was required to pay overtime to workers if they worked more than forty hours in a week. (TR2 216-218; PX 3)

Respondent stated that the Forest Service explained that, under the Davis Bacon Act, he was required to submit certified payrolls to them. Respondent explained that Ms. Mallie kept records of the hours the men worked, and that the total number of hours on the certified payrolls are correct. Respondent indicated that the certified payrolls did not list the deductions that he felt were permitted under the Copeland Act, which were the charges he allowed the employees to make with his credit card. Such charges were deducted from the employees pay, and Respondent kept a log on the back of each payroll card. He stated that the employees agreed to this arrangement. (TR2 218-228; PX 5)

Respondent testified to the contents and notations on the time cards. He stated that the various entries were made during the week that the work was performed. Respondent explained that he agreed to pay Mr. Mayberry a minimum of $300.00 per week, as Mr. Mayberry needed that amount to pay child care. He explained that, if due to deductions, Mr. Mayberry's pay did not amount to $300.00, money

would be advanced to him. Respondent stated that he deducted a variety of items from the employees paychecks, so that by the time he terminated Mr. Patterson, he owed Respondent almost $2,000.00 Respondent also stated that the employees were able to see the completed time cards on Friday, when they would be paid. He stated that he volunteered to give the time cards to Mr. Taverner of the Forest Service in August of 1992, but that Ms. Goodman stated that she did not want them. Respondent explained he would let them copy the time cards, but he would not leave them as too many of his documents that were left with them were lost. (TR2 228-254)

Respondent stated that he was on the job site, on average, about three times a week. He stated that Mr. Dave Relph complained to him about the work of Mr. Patterson and Mr. Mayberry. Respondent noted that Pavel Oajdea worked on the Serrano Comfort Station project, but not the Santa Ana River Trail project. However, Respondent explained that Mr. Oajdea was always riding with him and they would try to converse in English, and that Mr. Oajdea would accompany him on trips to the Santa Ana River trail project. Respondent stated that Mr. Oajdea told him, in broken English, that Mr. Patterson was not a good worker, and that he was sleeping on the job.(TR2 255-264)

Jonathan David Copeland

Mr. Copeland stated that he is an English instructor at Foothill High School in Tustin, California, and an assistant baseball coach at Biola University. He finds the Respondent to be “very trustworthy” and “very honest.” Mr. Copeland worked with Respondent during summers while he was in high school, and he “never saw any kind of glimpse that he would be capable of doing any dishonesty or cheating towards anyone.” Mr. Copeland also testified to Respondent’s generosity in helping others. He also testified that it would be “insane” for anyone to think Respondent could threaten someone. (TR2 266-270)

On cross-examination, Mr. Copeland stated that he was not sure whether he was ever at the Santa Ana River Trail project. (TR2 271-272)

Candace Humphries

Ms. Humphries stated that she is a secretary for a garage door company. With regards to Respondent, she stated that he is “honest, truthful and a man of integrity.” Ms. Humphries testified as to Respondent’s history of helping out the less fortunate. She never heard Respondent threaten anyone. (TR2 275-277)

On cross-examination, Ms. Humphries stated that she never worked for Respondent's contracting business. (TR2 277-278)

Richard Aspril

Mr. Aspril stated that he does inspections for the city of San Bernardino, relating to major public works projects, bridge building, new roads and infrastructure of every type. Mr. Aspril has never been a compliance officer.(TR2 291-296)[10] Mr. Aspril stated that he has known Respondent since 1983. They met through Respondent's church, and Mr. Aspril subsequently became an employee of Respondent. (TR2 at 305-308) Mr. Aspril explained that part of his job as a construction inspector in the public works engineering department is to administer contracts. (TR2 308-311)

On cross-examination, Mr. Aspril stated that he never contacted Ms. Goodman, and she never contacted him. (TR2 313-314)

David Mayberry

Mr. Mayberry stated that he began working for Respondent in October of 1991 or 1992, at the beginning of the Santa Ana River Trail job, and that he worked for him until February 17, 1992. Mr. Mayberry stated that at the time he was hired, he was unemployed, but not homeless. He also stated that he informed Respondent of his substance abuse problem when he was hired, but that at the time, he had been clean and sober for approximately three years.(TR2 326-329) Mr. Mayberry's attention was directed to the tool memos, and he stated that he had seen pages 282 and 283 before, but that he had not seen pages 279-281 before. He stated that Respondent never showed him the pages before, nor did he ever explain the tool and work regulations. He also stated that he was never told that clothing, materials or health insurance would be charged against his salary. Mr. Mayberry stated that the agreement he had with Respondent was that the job was to last seven months, and that he would be paid $11,000.00 for the entire job, and there would be a bonus if the job was finished earlier. He also stated that he was getting paid approximately $300.00 per week. (TR2 330-334)

Mr. Mayberry explained that he would get all the tools together and start out at about 6:00 a.m. on the way to go to work.

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[10]At the formal hearing, Respondent indicated that he was going to question Mr. Aspril as to his opinion on what constitutes a good compliance officer and what the duties of a compliance officer are in respect to buildings, roads, etc., where federal money is being used. (TR2 290-291) This Administrative Law Judge found that Mr. Aspril was not qualified to be an expert witness on what the duties of a compliance officer for the Department of Labor are. (TR2 297-298)

He further explained that, depending on the area, he would spend a lot of time cutting brush, and other days were spent laying down the trail itself. Mr. Mayberry's day usually ended around 4:30 or 5:00, and he never worked in the dark. Mr. Mayberry stated that he never slept, did drugs or drank alcohol on the job. (TR2 335-337) Mr. Mayberry indicated that Mr. Relph never complained about the quality of his work to him. He explained that Mr. Relph put Mr. Patterson in charge because he needed someone of a supervisory nature to be there when Respondent was not. (TR2 337-338)

Mr. Mayberry's attention was directed to the time cards, and he stated that he had never seen them before. He stated that the hours on the time card indicating he worked five hours a day, were incorrect. He also stated that he was not aware that Respondent was charging him a cash advance for a health accident insurance policy. He also indicated that he was unaware that Respondent was charging other items against his salary. It was Mr. Mayberry's impression that the tools belonged to Respondent. He did indicate that Respondent gave him $300.00 to buy a few things before the job started, and he believed he would have to repay Respondent for that. Mr. Mayberry stated that numerous notations on the time cards were incorrect, including time setting up a tent and time working on a vehicle. Mr. Mayberry's attention was directed to a notation on a time card that said that it was observed that Mr. Mayberry does 90% of the work and that Mr. Patterson rests, smokes and drinks beer on the job. Mr. Mayberry stated that he never saw Mr. Patterson drinking or using drugs on the job. Mr. Mayberry stated that many days he worked over eight hours and that Respondent never told him that he could not work more than forty hours in a week. (TR2 338-362; PX 8)

Mr. Mayberry explained that he was terminated because he had a little fire going to make some coffee on the trail. He further explained that before he made the fire he discussed it with Mr. Relph, and that there was no problem because there was no danger of fire. Mr. Mayberry stated that he attended the pre-work meeting with the Forest Service, but that he left early and was not present when the prevailing wage was discussed. Mr. Mayberry's attention was directed to PX 15, and he explained that he wrote that letter because he had complained about the money he was being paid, and then he was laid off. He also called Mr. Relph, who informed him that he was supposed to be paid $25.00 per hour. Mr. Mayberry then prepared a document setting forth what he should have been paid based upon his hours worked, and the prevailing wage. He was next interviewed by Ms. Goodman. Mr. Mayberry stated that kept a daily diary of the hours he worked in a notebook, but that he has lost the notebook. Mr. Mayberry was not sure if anyone from the Department of Labor contacted him in September or October of 1997

to determine his address and his availability to appear as a witness. (TR2 363-373; PX 15)

Mr. Mayberry stated that Glen Copeland, not Jerry Larson, was his supervisor on the Santa Ana project. He also stated that he never met Jerry Larson. Although he was familiar with the name of Pavel Oajdea, Mr. Mayberry stated that he never met him. Mr. Mayberry explained that Respondent came on the job around once every two weeks, although there was a time period when he came up two or three days in a two week period. (TR2 373-376)

On cross-examination, Mr. Mayberry's attention was directed to PX 15, and his notation that he was advanced $140.00, not $300.00 as he previously testified. (TR2 377-381; PX 15) Mr. Mayberry indicated that, during the first week on the job, he worked a half a day and two ten hour days. (TR2 385) He also indicated that he did have ice chests that he purchased on Respondent's account. (TR2 386) Mr. Mayberry stated that he was told by Ms. Mallie, not by Respondent, that he would get $11,000.00. (TR2 387) Mr. Mayberry stated that no one other than Cheryl Mallie saw his notebook containing the hours he worked, and that he used the notebook to calculate the wages he was owed. He last saw his notebook in December of 1996. (TR2 393-395; PX 15) Mr. Mayberry's attention was directed to his April 29, 1992 statement to Ms. Goodman, in which he stated that he worked on a notebook that he had since lost. Mr. Mayberry explained that it was actually misplaced, and that he subsequently found it. He also explained that, although he kept a day-by-day history of his work, he only put weekly figures in his calculation submitted to the Forest Service. (TR2 407-411; PX 15)

Mr. Mayberry stated the only advance he ever received was at the beginning of the job, and that such advance was offered by Respondent. He also stated that the $140.00 advance was to purchase work shoes. Mr. Mayberry indicated that he did not have numerous supplies when the job commenced, and that he was told by Ms. Mallie that such items were to by supplied for the job. (TR2 412-415) Mr. Mayberry did not have specific recollections of Mr. Relph inspecting the site on October 30, 1991 or December 3, 1991. (TR2 416-424) Mr. Mayberry explained the amount of trail he and Mr. Patterson would clear in one full work day would depend on the particular terrain. He stated that the most footage he ever cleared in one day was almost 1,000 feet, and the least amount was around 60 feet. (TR2 425-430)

Mr. Mayberry's attention was directed to Mr. Relph's diaries, where Mr. Relph indicated that there was a problem with use of a Bobcat. With regards to a claim to Respondent that 700 feet of trail had been finished, Mr. Mayberry stated that if there was

something wrong, it was 99.9% done. Mr. Mayberry indicated that his statement that he worked with Mr. Patterson until January 30, 1992, could have been wrong as he was guessing at the time he quit. Mr. Mayberry clarified that, when he referred to clearing 60 feet in a day, he was referring to the total accomplished by himself and Mr. Patterson. Mr. Mayberry stated that Ms. Mallie did not work on the trail, but that her job was to get supplies. (TR2 435-444; PX 4)

Mr. Mayberry did not remember Respondent giving Mr. Patterson a check for $500.00. He did not know whether the contractor spent the money to have the truck transmission fixed. Mr. Mayberry stated that there was no trail building machine on the job during the time he was there. He also stated that he took the tent down and brought it to Respondents house, and that he believed the majority of the tools were in Ms. Mallie's trailer. (TR2 450-452) Mr. Mayberry stated that he was not told by the Department of Labor that he had rights under any payment bond. (TR2 457) Mr. Mayberry stated that Mr. Patterson would have an occasional beer after hours. (TR2 460)

On re-direct examination. Mr. Mayberry stated that Respondent never asked him to fill out a time card. He agreed that he viewed Ms. Mallie as his supervisor, and that if she gave him a direction, he assumed it was coming from Respondent. He explained that Respondent used the Bobcat, and that he was not allowed to run it. (TR2 471-473)

John Patterson

Mr. Patterson stated that Respondent hired him in September or October of 1991 to put in a trail for the Forest Service. His attention was directed to the tool memo, and he stated that he never saw it while he was working for Respondent, although he did see the topo map. Mr. Patterson stated that Respondent never told him that he was required to pay for his own tools or charge supplies to Respondent's account. He also stated that he was never told that the cost of the chainsaw was coming out of his wages. Mr. Patterson explained that Respondent agreed to pay him $11,000.00 for the project, and that he would be paid $300.00 per week, and receive the remainder at the end of the project. He also stated that there would be a bonus if the trail was completed early. Mr. Patterson explained that he was not homeless when he was hired and that he was employed in position which paid on commission. (TR2 474-480; PX 6)

Mr. Patterson's attention was directed to the time cards, which he stated he never saw until counsel for the Department of Labor showed them to him. He indicated that the time cards were not accurate reflections of the amount of time he worked. Specifically,

he stated that the first day he worked four to five hours, but after that, he worked eight to twelve hour days. He explained that he typically started work at 6:30 or 7:00 and would work until sundown, with about forty-five minutes for lunch. Mr. Patterson stated that Respondent did not tell him to work only so many hours in a day. (TR2 480-484; PX 7) Mr. Patterson's attention was directed to his record of his hours worked and pay received. He explained that the exhibit is a photocopy of the records he kept in his notebook. He gave the copy to Ms. Goodman two or three months after he worked for Respondent. Mr. Patterson was not sure whether he still had the notebook, and he stated that the last time that he saw it was in 1996. He stated Ms. Goodman copied only the one page. (TR2 485-490; PX 14)

Mr. Patterson's attention was directed to the time cards, and he stated that he was never told by Respondent that he had accident and health insurance, or that he was being charged for the same. He stated that he did not know that as of November 1, 1991, that Respondent believed Mr. Patterson owed $2,350.00. He indicated that it was his understanding that nothing would be charged against him and that he would receive a draw every week that he worked. He also indicated that he had an agreement with Respondent that he would get a $300.00 draw every week, so that Mr. Patterson could meet his child support obligations. Mr. Patterson indicated that, to the best of his knowledge, he worked on the dates the time card lists him as replacing the tent and performing car repairs. However, he later stated that it took five or six hours to put up the tent, and that he considered that work. Mr. Patterson stated that he was not aware that the cost of the tools and supplies were charged against his salary. Mr. Patterson reviewed the time cards and indicated what he felt were inaccurate notations. He denied drinking heavily or doing drugs on the job. (TR2 490-504; PX 7)

Mr. Patterson explained that he kept weekly, not daily, records of his hours worked in his notebook. He also explained that he would report how many feet were completed everyday to Ms. Mallie. (TR2 505-507) Mr. Patterson stated that he met with Respondent in January of 1992 in San Bernardino, and that Respondent told him that "we were shut down from work," and that this was the Forest Service's decision. He denied that Respondent fired him. He also denied that, at the time, he was drunk with red eyes. Mr. Patterson indicated that it was his understanding that he might go back to work. He also indicated that at some other point in time, he contacted Respondent who informed him another crew was on the job. Mr. Patterson stated that he did not know Jerry Larson or Mr. Oajdea, although he did state that he saw some people he could not identify working with Glen Copeland. (TR2 510-514)

Mr. Patterson's attention was directed to Mr. Relph's diaries, and he stated that he never discussed whether he was receiving the proper pay with Mr. Relph, and that Respondent told him not to discuss pay with anyone. Mr. Patterson stated that Mr. Relph came out to check the work site as many as three or four times a week, but there were occasions when he was not there for a whole week. Mr. Patterson stated that Respondent used the Bobcat, and that neither Mr. Mayberry or himself ever used it. He also stated that Respondent would sometimes be away from the site for a few weeks, and occasionally he would show up once or twice a week. (TR2 515-520; PX 4)

On cross-examination, Mr. Patterson stated that he remembered receiving a large manilla envelope in the mail from Respondent, although he did not remember signing for it. He did not remember what he received, but his lawyer, whose name Mr. Patterson could not remember, told him not to worry about it. (TR2 520-524) Mr. Patterson stated that he cut firewood, hauled water and prepared a fire ring and extensive cooking facilities. He also stated that he asked Respondent for an advance of $140.00. He further stated that he expected Respondent to provide housing, as that was part of the agreement with the Forest Service. Mr. Patterson's attention was directed to Mr. Relph's diaries, in which he noted on October 23, 1991, that he thought work would start the next day. Mr. Patterson explained that work commenced after Mr. Relph left at 11:30 a.m. He also explained that he was working on December 3, 1991 when Mr. Relph came to inspect. Mr. Patterson stated that Mr. Mayberry would be mistaken if he said that they worked together until January 30, 1992, as Mr. Patterson's last day was January 3, 1992. Mr. Patterson recalled snow around Christmas of 1991, but he stated that he was able to work anyway as the snow was packed. (TR2 528-545; PX 4)

Mr. Patterson stated that Ms. Goodman did not tell him that Respondent had a security bond for the payment of any wages that might have become due, although he did state that he knows anyone who works for the government has to be bonded. Mr. Patterson stated that Ms. Mallie would confirm the hours he turned into her. He also stated that Mr. Ogden of the Department of Labor contacted him in September or October of 1997 concerning the case. (TR2 547-551) Mr. Patterson's attention was directed to a statement dated May 5, 1992, which Mr. Patterson stated was prepared by Ms. Goodman and signed by himself. Mr. Patterson indicated that he was not told by Ms. Mallie that she would be a subcontractor, and that he would be working for her. Mr. Patterson stated that he did not drink any beer on the job or at the campsite. He explained that a sack of empty beer cans at the site came from cleaning up other camp sites, and that Ms. Mallie wanted the cans for recycling. (TR2 552-559)

Mr. Patterson stated that he did not receive some of the certified payrolls from the Forest Service. He also stated that he unsuccessfully applied for unemployment benefits, and that Respondent claimed that he was not an employee. Mr. Patterson stated that he would build anywhere from 100 to 1,000 feet of trail a day, depending on terrain and circumstances. (TR2 559-569)

Sandra Goodman

Ms. Goodman testified that she is a compliance officer at the Wage and Hour Division of the U.S. Department of Labor. After describing, in general terms, her duties as a compliance officer, she indicated that she investigated Respondent after being contacted in April of 1992 by Ms. Silberberger about problems with Respondent. She began her investigation into the Santa Ana project in May of 1992, and she interviewed Mr. Patterson, Mr. Mayberry, Ms. Mallie and Mr. Ramirez. Although she did not interview Ms. Mallie's daughter, she was provided hours Ms. Mallie's daughter worked by other employees. Ms. Goodman determined that these were the only employees who worked on the Santa Ana project based on interviews and review of the certified payrolls. Ms. Goodman prepared witness statements after interviewing the employees and requested that the employees sign the statements. Ms. Goodman identified Mr. Patterson's record of his hours and wages, and she stated that he provided the record the day she interviewed him. She also identified Mr. Mayberry's record of his hours and wages. Ms. Goodman stated that she saw the originals of both records, but that it is not the policy to keep the originals. (TR2 852-871; PX 14, PX 15)

Ms. Goodman stated that she met with Respondent two or three times to discuss the investigation, the first time being in June of 1992. She stated that she asked Respondent to provide her with employment records, but he did not comply. She also stated that she never told Respondent that she was too busy to look at documents that he brought to her office. Ms. Goodman explained that she asked Respondent for W-2 forms and time cards in June of 1992, but that they were never provided. She further explained that Respondent claimed he did not have any such documents. Ms. Goodman's attention was directed to the time cards in evidence, and she stated that the first time she saw them was in March of 1998, in the office of counsel for the Department of Labor. (TR2 871-875; PX 7)

Ms. Goodman's attention was directed to the certified payrolls and the time cards, and she stated that while the gross wages of Mr. Patterson appear to be the same, there was a difference in the net amount paid. Ms. Goodman explained that, under the Copeland Act, any deductions that are going to be made from wages need to be

reflected in the certified payrolls. She added that the certified payrolls in this case itemize all of the legal deductions that are customarily made, but the time cards reflect other deductions that were made. Ms. Goodman made similar observations with regards to the time cards and certified payrolls relating to Mr. Mayberry. (TR2 875-880; PX 5, PX 7, PX 8)

Ms. Goodman's attention was directed to Respondents tool memos, which she stated that she first saw in March of 1998. (TR2 880; PX 6) Ms. Goodman stated that, in addition to the certified payrolls, she also reviewed the canceled checks. She explained that both the certified payrolls and the canceled checks were provided by Ms. Silberberger of the Forest Service.(TR2 881-882; PX 9, PX 10) Ms. Goodman's attention was directed to her computation sheet for Mr. Mayberry, which she explained showed the hours he worked, wages paid and the amounts that were ultimately found due. She explained that back wages were based upon the employees statement as to the hours he worked. She further explained that she looked at the hours worked in the week, but that it was necessary to look at daily hours to determine if the employee worked more than forty hours in the week. This is used to determine how much overtime is due, and for liquidated damages purposes. Ms. Goodman based her calculations on an average of nine hours worked a day, which was related to her by the employee. Employees statements are compared to the written documentation for comparison. (TR2 883-886; PX 12)

Upon questioning by the undersigned, Ms. Goodman stated that Mr. Mayberry did not show her a notebook which contained his hours worked and wages paid, nor would she have made a copy of it. She also stated that if Mr. Patterson had other information in his notebook which she saw, she would have copied it. (TR2 886-887) Ms. Goodman's attention was directed to her computation sheet for Mr. Patterson. She explained that he methodology for computing his wages were the same as for Mr. Mayberry. (TR2 887-888; PX 13) Ms. Goodman prepared a summary of unpaid wages on April 9, 1998, which totaled $21,766.10 for both employees. She prepared a prior summary in 1992, but updated it to make it more legible, and to delete additional employees who are no longer part of the case. Ms. Goodman stated that she provided the Respondent with the computation sheets and summary in June or July of 1992. She stated that Respondent was given the opportunity to provide additional information, but, to the best of her knowledge, he did not. (TR2 888-891; PX 11, PX 12)

Ms. Goodman stated that her investigation was completed in July of 1992, at which time she submitted it to her supervisor for review. Ms. Goodman re-opened the case file in September of 1992, when she received a call from the Forest Service explaining that there were concerns with regards to the Serrano Comfort Station project. She stated that Mr. Aspril did not contact her with respect to either the Serrano Comfort Station project or the Santa Ana project. She also stated that she did not interview Mr. Oajdea in connection with her investigation into the Serrano Comfort Station project. Ms. Goodman stated that Respondent did not direct her to contact either Mr. Aspril or Mr. Oajdea in regards to her investigation into the Santa Ana project. Ms. Goodman explained that since Respondent was not satisfied with the investigation

continuing on the first contract, she felt that it did not make sense for her to attempt any more contacts. Thus, her supervisor, Mr. Taverner, tried to resolve both investigations. Ms. Goodman concluded her investigation in May of 1993, and she sent her findings to Mr. Taverner. (TR2 891-905)

On cross-examination, Ms. Goodman produced a notation for June 15, 1992, which indicated that she met with Respondent, but that he did not provide records as requested. She indicated that she did not believe that there were any conversations prior to Ms. Silberberger's April 13, 1992 telephone call concerning Davis-Bacon violations. (TR2 909-913; CX 112) Ms. Goodman's attention was directed to an October 6, 1992 letter to Mr. Taverner from Respondents former counsel. She agreed that the letter stated that they would be happy to provide any more records or time sheets if asked. She also agreed that the tone of the letter did not indicate an intention to keep any records or time cards from Mr. Taverner. (TR2 913-916; PX 25)

Ms. Goodman stated that she first saw the certified payrolls on April 29, 1992, when she reviewed material from Ms. Silberberger. She also indicated that she saw Respondents annotated documents in one of her meetings with counsel for the Department of Labor. (TR2 925-926) Ms. Goodman indicated that she did not give Respondent credit for monies withheld for state and federal taxes or social security because the certified payrolls did not appear to be correct. She further explained that if the certified payrolls appear to be falsified, she computes back wages, and it is the employer's obligation to meet all the legal deductions he needs to make on any back wages computed. Ms. Goodman stated that she has never had the W-2 forms. She also stated that she did not recall

receiving a request from Respondent to provide any information in her case file. She further stated that such a request would be handled by Mr. Taverner. (TR2 930-933)

Ms. Goodman stated that the Wage and Hour Division does not have jurisdiction to enforce any of the regulations under FAR. She indicated that at some point early in her investigation she might have told Respondent that the investigation should be over in three weeks. Ms. Goodman indicated that she did not know anything about the Miller Bond Act. (TR2 941-945) Ms. Goodman did not recall Respondent ever complaining to her about lost checks. She denied telling Respondent on June 15, 1992 to leave his evidence because she did not have time to look at it.(TR2 948) Ms. Goodman was informed by Ms. Mallie that she had daily notes of the hours she worked, but Ms. Goodman stated that she never received the notes. She explained that Ms. Mallie became unlocateable shortly after the initiation of the investigation. (TR2 951-952)

Ms. Goodman explained that she credited the amounts the employees stated they received either in cash or via check. She also explained that the wage rate that she applied was the rate listed at Area 2, Group 1 in the contract. (TR2 954-961; PX 2) Ms. Goodman indicated that she did not give Respondent credit to Mr. Patterson for $140.00 in prepaid wages he testified to receiving. (TR2 967) Ms. Goodman explained that she had climatological reports provided by Respondent, but she determined that they did not bear any impact on the hours that the employees claimed they worked. (TR2 971) She indicated that, to the best of her knowledge, the Wage and Hour Division has not lost any materials, evidence, checks or affidavits. (TR2 973)

Ms. Goodman explained that she consulted with Mr. Relph as to whether work had progressed during the time the employees claimed to have worked, in order to determine if the hours were accurate. Ms. Goodman indicated that she did not believe that the Davis-Bacon Act requires laborers to buy their own tools. (TR2 1024-1031) She also indicated that she did not review the documents at CX 98 as part of her investigation. Ms. Goodman explained that there was no supporting evidence that the payments listed on the certified payrolls were actually made. (TR2 1036-1038) Ms. Goodman stated that she based her findings on the record of hours worked provided by the employees, and on information and evidence provided by the Forest Service. (TR2 1042-1044)

On re-direct examination, Ms. Goodman stated that, at the time of her investigation, she was not provided time cards, and she was unaware that there were deductions from the worker's pay for tools. (TR2 1045-1046) She also stated that Respondent was provided an opportunity to provide any information to dispute her findings, but he provided no information. (TR2 1046-1052) Ms. Goodman stated that Respondent explained to her that he considered the amounts he paid for tools to be wages. (TR2 1052-1055) On re-cross examination, Ms. Goodman indicated that she believed she understands what constitutes a pre-paid advance wage to an employee. (TR2 1059)

Bill J. Copeland

Respondent stated that his petition to the Wage Appeals Board was to obtain a ruling on the issue of the wage determination, although he also sought an order of reference. (TR2 1200) Respondent stated that he gave the Forest Service copies of his annotated documents, which he described as "pre-payment of wages." He explained that he did not describe the deductions on the certified payrolls because he considered that information confidential, as the employees were members of his church. (TR2 1201-1205; CX 19)

Respondent stated that the employees did not begin work until October 28, 1991, as they spent three days setting up camp. He stated that he provided the money for all the items the employees were purchasing, except for food. He also stated that, as the employees did not have transportation, it was a benefit for them to have the camp. Respondent explained that no one was watching the employees on many days, and they had the freedom to begin and end their day whenever they felt like it. (TR2 1211-1216) Respondent explained that he began using the trailblazer on December 16, 1991. At the end of the first week, Respondent accomplished three thousand feet of finished trail. On December 21, 1991, Respondent terminated Mr. Patterson for falsifying hours and for other habits which he could not continue to allow. On January 2, 1992, Respondent found that the camp had been abandoned since December 19, 1991. (TR2 1216-1219) Respondent stated that his progress payment number four was seized by Ms. Silberberger on March 4, 1992, one day after the first complaints were made to the Forest Service. He explained that he received no cooperation from Mr. Ogden. He also testified as to his inability to subpoena witnesses and obtain answers to interrogatories. (TR2 1221-1227) Respondent terminated Mr. Mayberry the week ending on February 21, 1992.

After the claims were made, Respondent went to Mr. Crane's office at the Forest Service on March 24, 1992, and he brought all files, annotated certified payrolls, checks and payroll cards. He

indicated that no credit was given for government withholdings or advanced wages. Respondent explained that when Ms. Silberberger handed the case over to the Department of Labor, she included many of Respondents checks, which he has not seen since. He explained this was why he no longer would leave his documents with the government. Around June 15, 1992, Respondent had an appointment with Ms. Goodman to go over his tax and payroll records, with the understanding he would be given time to explain his records and that the records would not leave his sight. Respondent waited for Ms. Goodman, and she eventually told him to leave the records, as she did not have the time to go over them. Respondent would not leave the records because he was not given the chance to explain how he kept the records. The contracts were terminated on September 18, 1992, and his bond company was compelled to complete both projects. (TR2 1227-1232)

As a result of the proceedings against him, Respondents property was foreclosed on him, he was forced to sell his tools and equipment, and he now lives on a small estate as a groundskeeper in exchange for his room and board. (TR 1232-1234) Respondent testified that he gave original checks, which would verify the state and federal taxes he paid, to Ms. Silberberger. (TR2 1237; CX 16)[11]

Discussion and Conclusions

Legal Standard

In order to determine the issue of underpayment in this case, this Court must consider the principles enumerated by the U.S. Supreme Court in **Anderson v. Mt. Clemens Pottery Co.**, 328 U.S. 680 (1946).

Under the principles set forth by the Supreme Court, an employee who seeks to recover unpaid wages "has the burden of proving that he performed work for which he was not properly compensated." 328 U.S. at 687. However, this burden is not intended to be "an impossible hurdle." **Id**. Indeed, "where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, ... the solution is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work." **Id**. In

[11]Counsel for the Department of Labor stipulated that Respondent filed the tax returns, and that he wrote checks that were cashed. Counsel further stipulated that, to the extent that the amounts on the certified payrolls do not exceed the amounts that he has paid, Respondent should get credit for those amounts. (TR2 1239-1241)

such circumstances, an employee meets his burden "if he proves that he has 'in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.'" **Id**.

The employer then has the burden to demonstrate the precise number of hours worked or to present evidence sufficient to negate "the reasonableness of the inference to be drawn from the employee's evidence." 328 U.S. at 688. In the absence of such a showing, the court "may then award damages to the employee, even though the result be only approximate." **Id**.

Thus, as the Ninth Circuit recognized in **Brock v. Seto**, 790 F.2d 1446, 1448 (1986), **Mt. Clemens Pottery** leaves no doubt that an award of back wages will not be barred for imprecision where it arises from the employer's failure to keep records. ..." Furthermore, **Mt. Clemens Pottery** provides specific guidance on the responsibilities of the trier of fact: "Unless the employer can provide accurate estimates [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence. ..." 328 U.S. at 693.

Discussion

This interesting case raises multiple issues which are presented by contradictory evidence. Complainant avers that the employees have been underpaid. Respondent denies underpayment and alleges that the employees have been overpaid. The parties are in complete disagreement and look to this Court for acceptance of their respective positions.

In order to determine where the truth exists in the facts of this case, this Court has reviewed the entire record with the transcript and has carefully examined each exhibit. The findings of fact and conclusions of law are based upon my observation of the conduct and demeanor of the witnesses who testified before me at the hearing and upon my analysis of the entire record, briefs and arguments of parties and consideration of applicable regulations, statutes and case law. **Pollution Control Construction Company**, WAB Case 88-6 (April 27, 1990).

Ms. Sandra Goodman, the wage and hour compliance officer who conducted the investigation in this case, appeared at the hearing and testified as to the methodology used in her computations. Ms. Goodman stated that the calculations she made for each employee were based on employee interviews and records of hours and wages kept by Mr. Patterson and Mr. Mayberry. (TR2 852-871; PX 14, PX 15)

She also reviewed the certified payrolls and canceled checks. (TR2 881-882; PX 9, PX 10) Ms. Goodman explained that she also consulted with Mr. Relph as to whether work had progressed during the time the employees claimed to have worked, in order to determine if the hours were accurate. (TR2 1024-1031) She indicated that she did not review the time cards, as they were not provided to her. (TR2 871-875; PX 7) Ms. Goodman indicated that she did not give Respondent credit for monies withheld for state and federal taxes or social security because the certified payrolls did not appear to be correct. (TR2 930-933) As Ms. Goodman relied on the statements and records of Mr. Patterson and Mr. Mayberry, I find that her computations relating to wages owed to Mr. Patterson and Mr. Mayberry are not supported by the record. Having listened to the testimony given and observed the demeanor of the witnesses, I find that the testimony of the employees is not credible. Both Mr. Patterson and Mr. Mayberry gave evasive and combative testimony, and I noted numerous inconsistencies which call their testimony into question. I also find that their testimony conflicts with that of Mr. Copeland, who I find to be a highly credible, eager and forthright witness, and whose testimony did not waiver in the face of probing questioning by counsel for the Department of Labor.

Both Mr. Mayberry and Mr. Patterson claimed that they kept track of their hours in notebooks. However, both employees claimed to have lost the notebooks prior to the hearing.(TR2 407-411, 485-490) Although I note that employees are not required to keep such records, I find that the testimony of the employees with respect to these notebooks raises questions concerning their credibility. For instance, Mr. Patterson stated that he provided the notebook to Ms. Goodman, and she only copied one page out of it. (TR2 485-490; PX 14) However, Ms. Goodman stated that if Mr. Patterson had other information in the notebook she saw, she would have copied it. (TR2 886-887) At the hearing, Mr. Mayberry’s attention was directed to his April 29, 1992 statement to Ms. Goodman, in which he stated that he worked on a notebook that he had since lost. Mr. Mayberry explained that it was actually misplaced, and that he subsequently found it, only to lose it again in December of 1996. (TR2 393-395, 407-411; PX 15)

I also find that the amount of hours claimed by Mr. Patterson and Mr. Mayberry is not supported by the diary reports of Mr. Relph. Mr. Mayberry explained that he would start out for work at about 6:00 a.m., and usually worked until around 4:30 or 5:00 p.m. (TR2 335-337) He also explained that the amount of trail he and Mr. Patterson would clear in one full day would depend on the terrain. He stated that the most he cleared in one day was almost 1,000 feet, and the least was around 60 feet. (TR2 425-430) Mr. Patterson testified that he started work at 6:30 or 7:00 a.m., and he worked

until sundown. (TR2 480-484) He also testified that he would build anywhere from 100 to 1,000 feet of trail a day, depending on terrain and circumstances. (TR2 559-569) Despite these claims of ten to twelve hour days, Mr. Relph's diaries indicate little progress in the work. In an entry dated December 3, 1991, Mr. Relph noted that twenty percent of the time was used, but only ten percent of the work was completed. (PX 4) On December 11, 1991, Mr. Relph noted that twenty-four percent of the time was used, but only eleven percent of the work was completed. (PX 4) It was not until March 4, 1992 that Mr. Relph noted that the work was on schedule, as sixty-two percent of the time was used and seventy percent of the work was completed. (PX 4) Respondent testified that he began using a trailblazing machine on December 16, 1991, and this is what allowed him to catch up with the work. (TR2 1216-1219)

Mr. Mayberry's credibility is further called into question given the fact that he, along with Cheryl Mallie, signed letters dated March 9, 1992 and March 12, 1992 requesting wages due for work done on the Santa Ana project. (PX 15, PX 16) In the March 12, 1992 letter, Ms. Mallie indicated that she was not paid Davis-Bacon wages. However, at the formal hearing, Mr. Mayberry stated that Ms. Mallie did not work on the trail, but that her job was to get supplies. (TR2 435-444) The certified payrolls show that Ms. Mallie was identified as a "superintendant" and not a laborer. (PX 5)

There were numerous other inconsistencies in the testimony of Mr. Patterson and Mr. Mayberry which call into question their credibility, and their assertion as to the number of hours they worked. Mr. Patterson denied drinking heavily or doing drugs on the job, and he also stated that he did not drink any beer on the job or at the campsite. He explained that a sack of empty beer cans at the site came from cleaning up other sites, and that Ms. Mallie wanted the cans for recycling. (TR2 490-504, 552-559) Although Mr. Mayberry stated that he never saw Mr. Patterson drinking or doing drugs on the job, he also stated that Mr. Patterson would have an occasional beer after hours. (TR2 338-362, 460)

I find that Mr. Patterson and Mr. Mayberry were not credible witnesses, and that they provided inflated estimates of hours worked to Ms. Goodman. Consequently, the computations made by Ms. Goodman are based upon figures that do not accurately reflect the actual hours worked by Mr. Patterson and Mr. Mayberry. Instead, I find and conclude that the certified payrolls accurately reflect the number of hours worked by the employees, and they also establish that the employees were paid the prevailing wage of $25.15, as set out in General Wage Decision No. CA91-2. (PX 2, PX

5)[12] However, the issue still remains as to whether the deductions made by Respondent are proper, an issue which I shall now resolve.

I pause to note that the complainant contends that Respondents time cards "are bogus efforts to conceal Respondent's violative pay practices and to show, in a contorted fashion, purported Davis-Bacon and CWHSSA compliance." (Complainant's Brief at 25) However, I find that Respondent credibly explained why he failed to produce the time cards when originally requested. Respondent explained that when he went to Mr. Crane's office at the Forest Service on March 24, 1992, he brought all his files, annotated certified payrolls, checks and payroll cards. He further explained that when Ms. Silberberger handed the case over to the Department of Labor, she included many of his checks, which he has not seen since. Because of this, Respondent became apprehensive about leaving documents with the Department of Labor. Around June 15, 1992, Respondent had an appointment with Ms. Goodman to go over his records. He waited for Ms. Goodman, who eventually told him to leave the records, as she did not have time to go over them. Respondent would not leave the records because he was not given the chance to explain how he kept the records. (TR2 1227-1232) I find Respondents explanation to be credible, especially in light of the fact that he provided the same explanation at the previous hearing on December 9, 1996. (TR 31) Moreover, the October 6, 1992 letter to Mr. Taverner from Respondent's former counsel indicates Respondents willingness to resubmit pay records and weekly timesheets if requested. (PX 25) For these reasons, the undersigned will not draw the inference that the time cards are "'after the fact records' concocted by the Respondent to support his scheme to violate the Davis-Bacon Act and Contract Work Hours and Safety Standards Act," as suggested by complainant. (Complainant's Brief at 19)

Payroll deductions permissible pursuant to the Davis-Bacon Act are set forth at 29 C.F.R. §3.5. Respondent explained that he allowed Both Mr. Patterson and Mr. Mayberry to charge items to his account, and that such charges would subsequently be deducted from their pay as pre-advanced wages. (TR2 189-200) Respondent explained that he kept track of such charges on the back of each payroll card, and that the employees agreed to this arrangement. (TR2 218-

[12]Although Respondent challenged the appropriateness of the wage determination, such challenge is not timely. Challenges to the accuracy of a Davis-Bacon wage determination must be made prior to the contract award. **Rite Landscape Construction Co. Inc**., WAB 83-3 (October 18, 1983) The Wage Appeals Board, by decision dated January 31, 1995, noted that Respondent alleged to have discussed with the contracting officer, at a pre-job conference, conformance of an additional work classification and rate, but failed to further pursue modification of the wage determination as required by regulation at 29 C.F.R. 5.5(a)(1)(v)(A).

228; PX 5) He further explained that he did not describe the deductions on the certified payrolls because he considered that information confidential, as the employees were members of his church. (TR2 1201-1205) Respondent did include deductions made for tax purposes on the certified payrolls. (PX 5)

Respondent prepared a "Tool and Work Regulation Memo" dated October 20, 1991. (PX 6) The memo states that workmen and supervisors "may make purchases of tools, work clothing, [and] safety equipment on a prepayment of wage basis." A "Tool Memo Adendum" dated October 30, 1991, states as follows (PX 6):

> While laborers are to obtain all hand tools, the ownership of these tools will remain with the contractor. Tools will become the responsibility of each laborer, and will be charged to his advanced wage account. When tools are returned laborers will be given the full credit charged to their accounts with no deductions for normal wear. Any tools damaged beyond repair, stolen or lost will remain charged to advanced wage or prepaid of wage account.

I find that Respondent's deductions of taxes, as listed on the certified payrolls, was proper pursuant to Section 3.5(a).[13] However, I also find that the remaining deductions made by Respondent were not proper under Section 3.5, and therefore, Respondent has failed to pay all wages owing to Mr. Patterson and Mr. Mayberry. Both Mr. Patterson and Mr. Mayberry denied ever seeing Respondents tool memos. (TR2 330-334; 474-480) Respondent stated that he did show the memos to the employees. (TR2 185-188; 193-200) Even if the employees did see and agree to the contents of the tool memos, that fact would not make permissible the deductions made by Respondent. Section 3.5(k) allows for:

> Any deduction for the cost of safety equipment of nominal value purchased by the employee as his own property for his personal protection in his work, such as safety shoes, safety glasses, safety gloves, and hard hats, if such equipment is not required by law to be furnished by the employer, if such deduction is not violative of the Fair Labor Standards Act or prohibited by other law, if the cost on which the deduction is based does not exceed

[13]That section allows for "Any deduction made in compliance with the requirements of Federal, State, or local law, such as Federal or State withholding income taxes and Federal social security taxes." 29 C.F.R. §3.5(a)

> the actual cost to the employer where the equipment is purchased from him and does not include any direct or indirect monetary return to the employer where the equipment is purchased from a third person, and if the deduction is either
>
> (1)Voluntary consented to by the employee in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of employment or its continuance; or
>
> (2)Provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its employees.

Respondent deducted $300.00 and $440.00 from Mr. Patterson and Mr. Mayberry respectively, during the pay period ending November 1, 1991. (PX 7, PX 8) Respondent noted on the time cards that the deducted earnings were used to purchase Gloves, shoes, socks, protective jackets and rain gear. (PX 7, PX 8) However, such deductions are not proper because, pursuant to Section 3.5(k)(1)[14], they were not voluntary consented to by the employees in writing. Respondents tool memos were not signed by either Mr. Patterson or Mr. Mayberry, and Respondent provided no other writing signed by the employees which covered the issue of deductions.

Furthermore, with regards to the tool memos, there is no provision in Section 3.5 which allows for the deduction from an employees pay the cost of tools needed to perform the requirements of the contract. Thus, deductions made by Respondent for the purposes outlined in his tool memos are not authorized, and Mr. Patterson and Mr. Mayberry are entitled to monies deducted for these purposes. Respondent also deducted $2,150.00 from both Mr. Patterson and Mr. Mayberry for accident and health insurance.[15] (PX 7, PX 8) Although there is a dispute as to whether the employees asked Respondent to purchase insurance or were aware that such insurance would be charged against their account, it is not necessary to resolve this dispute. Section 3.5(d) allows for such deductions only if they are: (1) voluntary consented to by the employee in writing, or (2) provided for in a bona fide collective bargaining agreement. 29 C.F.R. §3.5(d)(1)(2)(i)(ii). As Respondent

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[14]Section 3.5(k)(2) is not applicable, as the employees were not subject to a collective bargaining agreement.

[15]The time cards submitted by Respondent indicate that he later credited both employees for $2,150.00 when the insurance was canceled. (PX 7, PX 8)

submitted no writing in which the employees consented to such a deduction, and as the employees are not subject to a collective bargaining agreement, the deduction is not authorized under the regulations.

Respondent argues that deductions made were for advanced wages paid to employees. Section 3.5(b) allows:

> Any deduction of sums previously paid to the employee as a bona fide prepayment of wages when such prepayment is

made without discount or interest. A bona fide prepayment of wages is considered to have been made only when cash or its equivalent has been advanced to the person employed in such manner as to give him complete freedom of disposition of the advanced funds.

29 C.F.R. §3.5(b) I find that the advanced wages claimed by Respondent are not a bona fide prepaymment of wages, as the cash advanced to the employees was necesitated by Respondents deductions for purposes not authorized by the regulations.

It has been previously determined that the certified payrolls accurately reflect the number of hours worked by the employees, and that they also establish that the employees were paid the prevailing wage of $25.15. However, as Respondent made improper deductions from they pay of Mr. Patterson and Mr. Mayberry, it must be determined how much money is owed to the two employees. To arrive at the appropriate figure, I will use the certified payrolls and time cards to determine the number of hours worked by Mr. Patterson and Mr. Mayberry, and to determine the wages earned based on the prevailing wage rate. Respondent will be credited for the taxes paid on behalf of the two employees, as such deductions are proper pursuant to Section 3.5(a). Finally, the difference between actual wages paid and the wages due will equal the amount owed to the employees. Consequently, I find that Mr. Patterson is owed wages of $963.90 and Mr. Mayberry is owed wages of $2,987.10, computed as follows:

John Patterson

Week Ending	Hours Worked	Wage Rate[16]	Total Due	Taxes Paid	Cash Paid	Wages Owed

[16]The certified payrolls establish that for the first four pay periods, Respondent utilized an hourly wage of $25.00. As the prevailing wage rate for the Santa Ana project was $25.15, the wages owed Mr. Patterson and Mr. Mayberry will be based on the prevailing wage of $25.15. (PX 5)

11/1/91	24	25.15	603.60	175.90	300.00	127.70
11/8/91	24	25.15	603.60	175.90	300.00	127.70
11/15/91	24	25.15	603.60	175.90	190.00	237.70
11/22/91	24	25.15	603.60	175.90	340.00	87.70
12/6/91	24	25.15	603.60	175.90	300.00	127.70
12/13/91	24	25.15	603.60	175.90	300.00	127.70
12/20/91	24	25.15	603.60	175.90	300.00	127.70
12/27/91	No Work					
1/3/92	No Work					
1/10/92	Fired					

Subtotals	4,225.20	1,231.30	2,030.00	963.90
Less Severance Pay				500.00
Totals				463.90

David Mayberry

Week Ending	Hours Worked	Wage Rate	Total Due	Taxes Paid	Cash Paid	Wages Owed
11/1/91	24	25.15	603.60	55.90	300.00	247.70
11/8/91	24	25.15	603.60	55.90	340.00	207.70
11/15/91	24	25.15	603.60	55.90	200.00	347.70
11/22/91	24	25.15	603.60	55.90	380.00	167.70
12/6/91	24	25.15	603.60	55.90	300.00	247.70
12/13/91	24	25.15	603.60	55.00	300.00	248.60
12/20/91	24	25.15	603.60	55.00	300.00	248.60
12/27/91	No Work					
1/3/92	No Work					
1/10/92	40	25.15	1006.00	87.01	500.00	418.99

1/17/92	24	25.15	603.60	55.00	300.00	248.60
1/24/92	No Work					
1/31/92	40	25.15	1006.00	87.01	700.00	218.99
2/7/92	No Work					
2/14/92	No Work					
2/21/92	24	25.15	603.60	55.00	163.78	384.82
2/28/92	Fired					

Totals 7,444.40 673.52 3,783.78 2,987.10

Debarment

In this proceeding, complainant has requested debarment of Bill J. Copeland, Prime Contractor. Complainant argues that it is established that Respondent failed to pay prevailing wage rates because he "systematically under-reported the hours worked by his employees and made impermissible deductions from their wages." (Complainant's Brief at 31) It is also argued that it is established that Respondent filed false certified payrolls because he "failed to show all hours worked by his employees in a work week on the certified payrolls and because the Respondent failed to show the actual wages paid to employees by failing to include all amounts deducted from the employee's wages on the certified payrolls." (**Id**.) Complainant concludes that Respondent's actions evidence a flagrant disregard of his obligations to his employees contrary to the provisions of 29 C.F.R. §5.12, and therefore, Respondent should be debarred.

Regulation 29 C.F.R. §5.12 sets forth debarment proceedings regarding violations of the Davis-Bacon Act and related acts.

Section 5.12(a)(2) in pertinent part provides that:

In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees,

and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible person or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standard provisions of the statutes listed in §5.1.

Based on my review of the entire record in this case, I find Bill J. Copeland, Prime Contractor, has disregarded his obligation to employees. By making deductions that were not authorized pursuant to Section 3.5 in the wages owed to Mr. Patterson and Mr. Mayberry, Respondent failed to pay his employees the wages to which they were entitled. Furthermore, in the signed certified payroll submitted by Respondent, he attested that no deductions were made either directly or indirectly from the full wages earned by the employees, other than permissible deductions pursuant to 29 C.F.R. Part 3. It is indicated on the back of the certified payrolls that deductions made in accordance with regulations are to be described in the blank space provided. However, Respondent did not describe the deductions he had made. The undersigned does not doubt the sincerity of Respondents explanation that he failed to list the deductions because he considered such matters confidential, as the employees were members of his church. However, that fact does not excuse Respondent from complying with the record keeping requirements of the Act.

Accordingly, based upon the entirety of the record, I find that Respondent made deductions from the employees pay that were not authorized under the regulations, resulting in an underpayment of wages to the employees, and he failed to report the deductions made on the certified payrolls. Thus, Respondent should be debarred from receiving government contracts under the Act for a period of three years.

Prejudice

In its Decision and Order of Remand dated October 31, 1997, the ARB adopted the administrative guidance set out in **The Matter of Public Developers Corp. (PDC)**, WAB Case No. 94-02 (July 29, 1994), and remanded the case to the undersigned to first determine after a fact finding hearing if a case against Respondent can be made. This Administrative law Judge could then determine after a hearing if Respondent has been actually prejudiced in his defense on the merits with regard to the claims of employees Patterson and

Mayberry, and whether such prejudice is directly attributable to the procedural delay.

In **PDC**, the ARB proceeded to analyze the issue of laches according to the framework set forth in **Tom Rob, Inc.,** WAB Case No. 94-03 (June 21, 1994)[17] and the guidance set forth in **J. Slotnik Company**, WAB Case No. 80-05 (Mar. 22, 1983). **PDC** at 8. The ARB went on to state that "[b]efore addressing whether an employer has demonstrated actual prejudice or whether a presumption of prejudice should apply in the circumstances of a particular case, an ALJ must first address the merits of the case." **Id**. at 11. The ARB explained that by deciding the case on the merits before moving on to the issue of prejudice, "the need to determine whether an employer has been prejudiced in its ability to present a defense is limited to those violations as to which the ALJ has determined that DOL has established a prima facie case which has not been rebutted by the employer." **Id**. The ARB further explained that the "requirement that an ALJ address the merits of a case, fully setting forth the findings of fact and conclusions of law on merits issues, will permit the Board to review appropriately both the merits issues and the issue of prejudice. **Id**. at 12. This Administrative Law Judge has already set forth his findings of fact and conclusions of law on the merits of this case, and I know turn to the issue of prejudice.

The first three factors to be considered when addressing the issue of prejudice due to administrative delay were thoroughly discussed in the undersigned's Decision and Order Granting Motion to Dismiss, issued on January 28, 1997. I will now summarize and update those findings before addressing the fourth factor, prejudice to the defendant.

Length of the Delay

The Wage and Hour Division's investigation of Respondent was initiated in March of 1992. By July of 1992, the Wage and Hour Division concluded that violations had occurred, warranting the withholding of funds otherwise due to Respondent. However, the

[17]The analytical framework involves the weighing of four factors to determine if a person's due process rights have been violated because of a delay in holding a hearing in a civil proceeding. The four factors to be considered are: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of her/his right to a hearing; and 4) prejudice to the defendants. **PDC** at 8.

formal charging letter was not issued by the Administrator until July 27, 1994, nearly two and one-half years after initiation of the investigation, and more than two years after the initial withholding of funds.

On August 9, 1994, Respondent filed a timely objection to the charging letter, and as permitted, also requested a formal hearing before the Office of Administrative Law Judges. In this regard, the applicable regulations provide:

> (3) Upon receipt of a timely request for a hearing, the Administrator **shall** refer the case to the Chief Administrative Law Judge by Order of Reference . . . .

29 C.F.R. §5.11(a)(3) (emphasis added). Despite this express mandate from the Secretary of Labor to issue an Order of Reference "upon receipt" of a request for a hearing, the Administrator did nothing upon receipt of Respondent's request. Having received no Order of Reference, Respondent petitioned the Wage Appeals Board for an order directing the Administrator to refer the case to the OALJ. On January 31, 1995, the Board found that the petition was not properly before it and therefore dismissed the same. However, the Board expressly urged the Administrator to "expeditiously issue an Order of Reference in this matter." **In re Copeland Construction Co.**, WAB Case No. 94-20 (January 31, 1995). Despite the aforementioned regulation from the Secretary, and despite the Board's urging, no Order of Reference was forthcoming. Instead, after an additional two months had elapsed, the administrator issued a superceding charging letter on March 28, 1995, which included the sanction of debarment. Again, Respondent timely requested referral to the OALJ for a formal hearing. Upon receiving this second request, the Administrator again failed to heed the Secretary's mandate that an Order of Reference be issued. Almost a year transpired before the Administrator issued an Order of Reference on February 5, 1996.

Upon referral to the OALJ, Judge Vittone issued a prehearing order, requiring the Administrator to file a prehearing statement within thirty days. Counsel for the Administrator waited for almost the entire period, and then at the expiration thereof, requested an additional two months to comply with the order. The request was granted over Respondent's objection. This matter was assigned to the undersigned on September 17, 1996, and a prehearing conference was held on December 9, 1996. At such time, counsel for the Administrator informed the undersigned that his client would be unable to proceed to trial until June 1, 1997, at the earliest.

On January 28, 1997, the undersigned issued a Decision and Order dismissing the claim due to prejudice resulting from the administrative delay. The Administrator sought review of that Decision and Order, and by Decision and Order of Remand dated October 31, 1997, the Board affirmed in part, reversed in part, and remanded the case for further decision. The Board dismissed the claims of all employees except Mr. Patterson and Mr. Mayberry. However, the Board remanded the case for a formal hearing, so that findings of fact could be made, and it could be determined whether Respondent was prejudiced due to the procedural delay.

The Board attempted to send its Decision and the case file to the Administrative Law Judge in San Francisco, but due to an outdated address, the file was delivered to the Office of Worker's Compensation Programs. It sat there until being shipped of to the Office of the Regional Solicitor in Los Angeles. The file was then sent to the Office of Solicitor in San Francisco. The file was finally received by the undersigned on February 23, 1998, and the formal hearing began on July 28, 1998.

Thus, Respondent was not afforded a formal hearing until July of 1998. This was more than six years after the initial investigation and the date funds were first withheld, and almost four years since the Order of Reference should have been issued. The undersigned finds that this constitutes excessive administrative delay.

Reasons for the Delay

In the Administrator's Response to the Order to Show Cause, counsel delineated eight specific reasons for the delays experienced in this matter. The majority of the Administrator's stated reasons address delay in the investigatory process, prior to issuance of the initial charging letter. These reasons included:

(1) several meetings were held between the WHD and the contractor in an effort to reach an informal resolution;

(2) the contractor had two separate contracts and several of the contractor's employees submitted late claims to the WHD (e.g. August 1992, by Glen Copeland, the contractor's grandson);

(3) the contractor was given several extensions of time within which he promised to provide relevant documents, such as withholding records, but the time periods expired absent compliance;

(4) resolution efforts with the contractor's lawyer over a period of several months;

(5) computational difficulties between the USDA and the bonding company;

(6) resolution efforts were conducted between the WHD and a congressional Member. A period during which other efforts were suspended;

(7) the contractor changed his mailing address without notifying the WHD.

The reasons given did serve to explain why there was at least some delay in the investigatory process. However, the undersigned found that such reasons did not adequately explain why it took more than two years to issue a charging letter. The undersigned also found that the reasons for the delay were not largely due to the conduct of the contractor.

The Administrator also failed to give any adequate explanation for the one and one-half years delay between the time the contractor first requested a formal hearing before the OALJ and the time the Administrator issued an Order of Reference. The Administrator pointed to the fact that "the contractor filed an inappropriate petition with the wrong forum, causing a suspension of efforts pending the issuance of a decision." However, this excuse did not explain why no action was taken on Prime Contractor's request for a hearing prior to his petition to the WAB. Furthermore, the delay could have been avoided if the Administrator had merely issued an Order of Reference, rendering the Prime Contractor's petition moot.

Even after the issuance of the Board's decision on January 31, 1995, the Administrator failed to issue an Order of Reference. Instead, a new charging letter was issued on March 28, 1995. Prime Contractor again timely requested a hearing before the OALJ, but an Order of Reference was not issued until February 5, 1996. The Administrator provided no explanation for this delay.

Respondents Assertion of His Right to a Hearing

There is no dispute that at all times, Respondent has asserted his rights under the DBA and its implementing regulations. Respondent has filed two requests for a hearing, both of which were timely under the regulations. The undersigned noted Respondent's eagerness to schedule a hearing and present his case at the pre-hearing conference on December 9, 1996. Furthermore, at all times

since this matter was finally referred to the OALJ, Respondent has alleged that he has been prejudiced by the well-documented administrative delay. As such, the undersigned finds that the Respondent has repeatedly asserted his rights under the law.

Prejudice to the Respondent

I find that Respondent has been actually prejudiced in his defense on the merits with regard to the claims of Mr. Patterson and Mr. Mayberry, and that such prejudice is directly attributable to the procedural delay. Respondents ability to present a defense on the merits has been severely hampered by the unavailability of Cheryl Mallie to testify at the hearing. Ms. Goodman testified that Ms. Mallie was a "transitory person", and she became "unlocateable not too long after the initiation of the investigation." (TR2 952)

Respondent testified that he hired Ms. Mallie as the superintendent on the Santa Ana project, and that her duties were to keep records of the hours worked and to pick up and deliver money to the laborers. Ms. Mallie was paid $800.00 per week. (TR2 125-127) Respondent also testified that he had an arrangement with Ms. Mallie whereby he gave her a truck and she was supposed to pay him $200.00 for a set period as repayment. He further testified that Ms. Mallie was given the privilege of "going in and buying anything she wanted," and that money counted towards her salary. (TR2 136-140) Respondent explained that most of the checks written to Cheryl Mallie were to be divided amongst the men. (TR2 148)

Both Mr. Mayberry and Mr. Patterson testified that they had agreements with Respondent whereby they would be paid $11,000.00 for the entire job, and there would be a bonus if the job was finished early. Mr. Patterson also stated that part of the agreement was that he would be paid $300.00 per week.(TR2 330-334; 474-480) However, Mr. Mayberry stated that he was told by Ms. Mallie, not by Respondent, that he would get $11,000.00 for his work on the project. (TR2 387) Mr. Mayberry indicated that he viewed Ms. Mallie as his supervisor, and that if she gave him a direction, he assumed that it was coming from Respondent. (TR2 471-473)

I find that Ms. Mallie's absence from the formal hearing was extremely prejudicial to Respondent, with regards to the claims of Mr. Mayberry and Mr. Patterson. Ms. Mallie's testimony would be crucial in resolving the issues faced by this Administrative Law Judge. Respondent and both employees agreed that Ms. Mallie was the supervisor of the Santa Ana project, and that one of her duties was to keep records of the hours worked by employees. Because of her unavailability, Respondent was not allowed to question Ms. Mallie

with regards to the accuracy of the hours submitted by Mr. Mayberry and Mr. Patterson. Mr. Mayberry testified that Ms. Mallie was the only person to see his notebook which contained the hours he worked. (TR2 393-395) As Mr. Mayberry stated that he last saw his notebook in December of 1996, Ms. Mallie's testimony as to the existence and contents of this notebook would be enlightening. Similarly, Ms. Mallie's testimony would be relevant as Mr. Patterson stated that she would confirm the hours he turned into her. (TR2 547-551) Furthermore, Ms. Goodman indicated that Ms. Mallie's written statement referred to the fact that she had records that showed the hours she and other workers worked. Ms. Goodman stated that such records were never received, and that Ms. Mallie became unlocateable. (TR2 951-952) As Respondent was unable to question Ms. Mallie with regards to the hours worked by the employees, I find that he has been prejudiced in his ability to present his defense.

I also find that the unavailability of Ms. Mallie has prejudiced Respondent with respect to other facts at issue in this case. In the Decision and Order of Remand dated October 31, 1997, the Board noted that there were inconsistencies between Respondent's comments and the employee's sworn statements. Specifically, the Board noted statements which pertained to the method of compensation being linked to work product indices up to a specified amount rather than an hourly wage as set forth in the Forest Service contract.

The testimony of Ms. Mallie would be critical to this issue. Respondent stated that he paid both Mr. Patterson and Mr. Mayberry the prevailing wage of $25.15 an hour, and he denied that he promised to pay those employees $11,000.00 plus a bonus. (TR2 189-200) Respondents denial is in contradiction to the testimony of both Mr. Mayberry and Mr. Patterson, as they both testified that they would be paid $11,000.00 for their work on the project. (TR2 330-334; 474-480) However, Mr. Mayberry testified that he was told by Ms. Mallie, not by Respondent, that he would be paid $11,000.00. (TR2 387) He also indicated that he viewed Ms. Mallie as his supervisor, and that if she gave him a direction, he assumed it was coming from Respondent. (TR2 471-473) Thus, given Respondents denial and Mr. Mayberry's testimony regarding Ms. Mallie's assertion that he would be paid a lump sum, I find that Respondent has been prejudiced because Ms. Mallie's unavailability forecloses on the opportunity to fully investigate the allegation that an agreement to pay a lump sum was made.

The unavailability of Ms. Mallie has also prejudiced Respondent with regards to the issue of deductions made by Respondent. Although I find no Fraudulent intent on behalf of

Respondent, through a series of poor bookkeeping and administrative practices, he created a confusing payment scheme. Respondent testified that he paid both employees the prevailing wage of $25.15 per hour. He explained that as both employees were out in the middle of the woods, had no bank accounts and did not have the equipment to start working, he allowed them to charge items to his account. Respondent considered such charges to be advanced wages, which he would subsequently deduct against later earnings. (TR2 193-200) He explained that he did not list the deductions on the certified payrolls because he considered that information

confidential, as the employees were members of his church. (TR2 1201-1205) Respondent did, however, keep a log on the back of each payroll card, listing the deductions made. He stated that the employees agreed to this arrangement. (TR2 218-228)

As Ms. Mallie's duties included keeping records of the hours worked by employees and paying the employees from checks issued by Respondent, I find that her testimony would be critical to understanding the deductions made by Respondent. Ms. Mallie would be able to testify as to whether the wages received by the employees corresponded with the number of hours they worked. Thus, she would also be able to testify as to any deductions taken out of the employees pay.

This issue also ties in with the issue of whether the employees method of compensation was linked to work product indices, rather than the prevailing hourly wage. Both Mr. Patterson and Mr. Mayberry stated that Respondent agreed to pay them $11,000.00 for the project, and that they would be paid $300.00 per week. (TR2 330-334; 474-480) The records of payments submitted by Mr. Patterson and Mr. Mayberry reflect that they were generally paid $300.00 per week. (PX 14, PX 15) Thus, the records of the two employees do not reflect the amount of deductions that Respondent himself has admitted that he made.

For the above-stated reasons, I find that Respondent has been prejudiced by the unavailability of Ms. Mallie to testify in this matter. As Ms. Mallie was responsible for keeping track of the hours worked by the employees and for disbursing payments, her testimony would be enlightening with regards the issues raised in this matter. Respondents inability to examine Ms. Mallie has denied him the opportunity to adequately present his defense. I note that the Board, in its Decision and Order of Remand dated October 31, 1997, barred recovery of Ms. Mallie's potential claim against Respondent.

The Board held that the Administrator's unwarranted delay, combined with Respondent's inability to conduct prehearing discovery with former complaining employees who were not certified to be witnesses at the hearing, was prejudicial to Respondent with regard to her claim in this case. I find that the prejudice suffered by Respondent because of the unavailability of Ms. Mallie is directly attributable to the well-documented procedural delay, as Ms. Mallie became unlocateable subsequent to the initiation of the investigation.

I also find that the absence of Ms. Silberberger prejudiced Respondent in his defense on the merits with regards to the Claims of Mr. Patterson and Mr. Mayberry. Mr. Copeland stated that attempted, unsuccessfully, to subpoena Ms. Silberberger on four separate occasions.[18] (TR2 89-90) Counsel for the Department of Labor explained that Ms. Silberberger retired from the United States Forest Service. (TR2 90) She also explained that she had a few conversations with an attorney for the Department of Agriculture, and she was told that because Ms. Silberberger is a retired federal employee, he could not compel her to attend the hearing. (TR2 91)

Although I have already determined that Respondents challenge to the appropriateness of the wage determination is untimely, Ms. Silberberger's testimony is relevant to other issues presented in this case. Respondent credibly testified that he had turned over numerous documents, including checks, to Ms. Silberberger, and that when she turned over the case to the Department of Labor, she included many of Respondents checks. Respondent stated that he has not seen these checks since Ms. Silberberger turned them over to the Department of Labor. He explained that he was reluctant to turn any more documents over to the Department of Labor after this point. (TR2 1227-1232)

Ms. Silberberger's testimony would be relevant because Respondent testified that he refused to leave records with Ms. Goodman because she did not have time to go over them with him when he was present. Ms. Goodman denied telling Respondent to leave his records because she did not have time to look at it. (TR2 948) As counsel for the Department of Labor argues that Respondent's time

[18]Respondent sent subpoenas to the United States Forest Service in San Dimas, and in San Bernardino, where the office was relocated. (TR2 89-90) He also stated that he spoke with Mr. Jim Andrews, an attorney for the United State Forest Service, in order to get Ms. Silberberger's address so that he could subpoena her. Respondent was told that such information could not be provided. (TR2 93-94)

cards “are bogus efforts to conceal Respondents’ violative pay practices ...”.

I find that Ms. Silberberger’s testimony would serve to establish the validity of Respondents stated reluctance to turn over his records. I also find that the prejudice suffered by Respondent based upon Ms. Silberberger’s unavailability to testify is directly attributable to the procedural delay, as Ms. Silberberger retired from the United States Forest Service in the Spring of 1994, subsequent to the investigation of Respondent.

Respondent has also been prejudiced in his defense on the merits with regard to the claims of Mr. Patterson and Mr. Mayberry due to the death of Mr. Pavel Oajdea. Respondent explained that, although Mr. Oajdea worked on the Serrano Comfort Station project, Mr. Oajdea was always riding with him and accompanied him on trips to the Santa Ana River Trail project. Respondent stated that Mr. Oajdea told him that Mr. Patterson was not a good worker, and that he was sleeping on the job. (TR2 258-264) Mr. Oajdea passed away on November 11, 1994. (PX 30)

I find that Mr. Oajdea’s testimony would have been relevant and probative as it would go to the issue of the number of hours worked by the employees, and thus, the amount of wages they were due. Counsel for the Department of Labor finds it suspect that Mr. Oajdea communicated his observations to Respondent given that Mr. Oajdea did not speak English. (Brief at 33-34) However, Respondent testified that Mr. Oajdea made his statements in “broken English.” (TR2 260) As Respondent testified that Mr. Oajdea had been working for him for twenty years, this Administrative Law Judge does not find it unbelievable that Mr. Oajdea would be able to adequately communicate with Respondent. As Mr. Oajdea passed away on November 11, 1994, I find that the prejudice suffered by Respondent due to his unavailability is due to the well-documented procedural delay in this matter.

Conclusion

Based upon the foregoing analysis, the undersigned finds that Respondent has carried his burden of showing that he has been prejudiced in his defense on the merits with regards to the claims of Mr. Patterson and Mr. Mayberry, and that such prejudice is directly attributable to the well-documented procedural delay in this matter. Therefore it is found that the matter should be dismissed with prejudice, and that all monies withheld from Respondent be returned to him.

ORDER

IT IS HEREBY ORDERED:

1. The Order of Reference dated February 5, 1996, charging Respondent with violations of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the implementing regulations, is dismissed with prejudice; and

2. The U.S. Department of Labor, Wage and Hour Division, shall secure the return to Respondent of all monies withheld by the U.S. Department of Agriculture, monies which were otherwise due Respondent under the subject contracts.

Entered this __ day of March, 1999, at Long Beach, California.

_____

Samuel J. Smith
Administrative Law Judge

SJS: